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IN THE

Supreme Court of the United States

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, FEDERALLY RECOGNIZED INDIAN TRIBES, AND INTER-TRIBAL FISH COMMISSIONS IN SUPPORT OF RESPONDENTS

JARED A. GOLDSTEIN
PROFESSOR OF LAW
ROGER WILLIAMS
UNIV. SCH. OF LAW
BRISTOL, RI 02809

KEVIN LYSKOWSKI
Counsel of Record
1300 PENN. AVE., NW, 190-321
WASHINGTON, DC 20004
Tel: (240) 506-5183
klyskowski@post.harvard.edu

Counsel for Amici Curiae
[Additional Counsel Listed on Inside Cover]

RIYAZ KANJI
KANJI & KATZEN P.L.L.C.
303 DETROIT ST., STE. 400
ANN ARBOR, MI 48104

PHIL KATZEN
JOHN SLEDD
KANJI & KATZEN P.L.L.C.
401 2ND AVE. S., STE. 700
SEATTLE, WA 98104

ELIZABETH KRONK WARNER
ASSOC. PROFESSOR OF LAW
THE UNIV. OF KANSAS SCH. OF LAW
LAWRENCE, KS 66045

JOHN DOSSETT
COLBY D. DUREN
REBECCA HOWLETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P ST., NW
WASHINGTON, DC 20005

RICHARD A. GUEST
NATIVE AMERICAN RIGHTS FUND
1514 P ST., NW, STE. D
WASHINGTON, DC 20005

ERICK ARNOLD
BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA TRIBE
72682 MAPLE ST.
ODANAH, WI 54861

SEAN COPELAND
FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA
1720 BIG LAKE RD.
CLOQUET, MN 55720

KEKEK JASON STARK
LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS
13394 W. TREPANIA RD.
HAYWARD, WI 54843

DAVID UJKE
RED CLIFF BAND of LAKE SUPERIOR CHIPPEWA
88385 PIKE RD.
BAYFIELD, WI 54814

HOWARD BICHLER
ST. CROIX CHIPPEWA INDIANS OF WISCONSIN
24663 ANGELINE AVE.
WEBSTER, WI 54893

COLETTE ROUTEL
PROFESSOR OF LAW
WILLIAM MITCHELL COLLEGE OF LAW
875 SUMMIT AVE.
ST. PAUL, MN 55105

ROBERT C. LOTHROP
COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION
700 NE MULTNOMAH ST.
STE. 1200
PORTLAND, OR 97232

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INTEREST OF AMICI*

Amici are federally recognized Indian tribes and inter-tribal organizations that are committed to protecting tribal members and tribal natural resources. Amici have a strong interest in the impact on American Indians and fisheries from the mercury emissions regulated by the rule at issue in this case.

The National Congress of American Indians (NCAI) is the oldest and largest national organization addressing American Indian interests. Founded in 1944, NCAI represents more than 250 federally recognized Indian tribes and Alaska Native villages. NCAI and its members are dedicated to protecting the health and traditional lifeways of American Indians and tribes, as well as the fisheries and other natural resources on which tribes depend.

The Bad River Band of Lake Superior Chippewa Tribe, the Fond du Lac Band of Lake Superior Chippewa ("Fond du Lac Band"), the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, the Red Cliff Band of Lake Superior Chippewa, the St. Croix Chippewa Indians of Wisconsin, and the Sokaogon Chippewa Community are bands of Ojibwe American Indians. The tribes' reservations are located in northern Wisconsin and Minnesota. Under various treaties, the tribes ceded land to the United States and reserved rights to fish, hunt, and gather in the ceded territories. Many of the tribes operate fish hatcheries that provide on- and off-reservation

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* The parties have filed letters with the Clerk indicating blanket consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

stocking of native fish, and all of the tribes manage fisheries resources to ensure safe and abundant supplies of fish for tribal members.

The Great Lakes Indian Fish and Wildlife Commission (GLIFWC) is a natural resource agency of eleven Chippewa (or Ojibwe) tribes, including the tribes discussed in the preceding paragraph, all of which ceded land to the United States under various treaties. The treaty-ceded territories encompass portions of east-central Minnesota, the northern third of Wisconsin, and the Upper and Lower Peninsulas of Michigan. GLIFWC's mission is to assist its member tribes in the recognition and implementation of their treaty-reserved, off-reservation hunting, fishing, and gathering rights. Part of GLIFWC's mission includes ecosystem protection, helping to ensure that natural resources are healthy and abundant throughout the ceded territories. GLIFWC provides comprehensive natural resource management services to its member tribes, including fisheries management, and has tested mercury levels in fish since 1989.

The Columbia River Inter-Tribal Fish Commission (CRITFC) provides fisheries technical services for four tribes in the Northwest (the Yakama, Warm Springs, Umatilla, and Nez Perce tribes). CRITFC and its member tribes are actively involved in fisheries management throughout the Columbia River Basin, which covers nearly 260,000 square miles and extends into seven states. CRITFC is dedicated to ensuring fisheries benefits for its member tribes now and in the future.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted certiorari to consider whether the Environmental Protection Agency (EPA or "the Agency") unreasonably declined to consider costs of regulation in deciding whether to regulate hazardous air pollutants emitted by electric utility steam generating units (EGUs). The Court of Appeals concluded that it was reasonable for EPA not to consider costs in deciding to regulate EGUs under Section 112 of the Clean Air Act, 42 U.S.C. § 7412. Pet'r's App. 33a. Petitioners and their amici argue that the statute requires EPA to consider costs – and, specifically, to weigh the costs against the benefits of regulation – before deciding whether to regulate. They urge this Court to reverse the Court of Appeals and vacate EPA's rule regulating EGUs.

In attacking EPA's decision, petitioners and their amici repeatedly disparage the benefits of the Agency's rule, which is known as the Mercury and Air Toxics Standards (MATS) Rule, variously describing the benefits as "minimal," "negligible," and "*de minimis*." *E.g.*, Mich. Br. at 46; U.S. Chamber of Commerce Br. at 13; Cato Inst. Br. at 5. For example, the state petitioners assert over and over that EPA calculated the annual benefit from the rule's mercury emission reductions as being only $4 to $6 million. *See* Mich. Br. at 4, 13, 19, 32, 47. However, the $4 to $6 million calculation is merely EPA's estimate of the benefits of avoiding IQ losses from EGU emissions of mercury. *See* 77 Fed. Reg. 9304, 9428 (Feb. 16, 2012). After providing that estimate, EPA went on to explain: "[T]hese calculated benefits are a small subset of the benefits of reducing [mercury] emissions." *Id.* Accordingly,

petitioners mischaracterize the record and grossly understate the benefits of the MATS Rule.

Amici are uniquely positioned to explain substantial benefits of the MATS Rule and correct the misstatements of petitioners and their amici. Although mercury pollution has been shown to pose risks for the population at large and to pose disproportionate risks for certain racial and socioeconomic groups, American Indians are perhaps more adversely impacted by mercury emissions than any other subpopulation in the United States. Fish consumption is the primary pathway for human exposure to methylmercury (the organic form to which mercury is converted after being emitted by EGUs). Many American Indians consume fish at far higher rates than the general population (in some instances, up to 4 or 5 times as high). As a result, American Indians are disproportionately impacted by mercury emissions. The emissions harm Indian health, putting tribal members at unusually high risk for neurodevelopmental disorders, cardiovascular disease, autoimmune deficiencies, and other adverse health effects from methylmercury exposure. In addition, mercury emissions harm Indian culture, threatening longstanding traditions of fishing and fish consumption that are central to many tribes' cultural identity. Finally, mercury emissions harm Indian subsistence, contaminating food sources that many tribal members depend on for survival. In comments to EPA on the proposed MATS rule, tribes and inter-tribal organizations repeatedly emphasized the adverse health, cultural, and subsistence impacts on American Indians from EGUs' mercury emissions.

The MATS Rule will substantially abate the mercury-related harms suffered by American Indians

and benefit them significantly. Consistent with Congress's expressed intent in Section 112 to protect "sensitive subpopulations," 42 U.S.C. § 7412(n)(1)(C), EPA, in the rulemaking process, considered and addressed the adverse health and other impacts of mercury emissions on American Indians. For example, EPA's assessment of the public health risk from EGUs was based on peer-reviewed data on fish consumption rates for high-fish-consuming groups, including tribes. Moreover, EPA concluded that some American Indians could receive an especially great benefit from the MATS Rule due to their fish consumption patterns. EPA did not, and concluded that it could not, monetize many of the mercury-related benefits of the MATS Rule. However, that does not mean that the benefits are, as petitioners and their amici contend, "minimal," "negligible," and "*de minimis*." Mich. Br. at 46; U.S. Chamber of Commerce Br. at 13; Cato Inst. Br. at 5. Rather, for American Indians, the health, cultural, and subsistence benefits to be gained from reduced mercury emissions under the MATS Rule are substantial and urgently important.

In the hundreds of pages petitioners have submitted to this Court, petitioners never once mention the significant benefits to American Indians and other at-risk communities from reductions in mercury emissions. Instead, petitioners content themselves with mocking the MATS Rule by comparing the costs imposed by the rule to the single benefit for which a dollar figure had been estimated. After more than a decade of delay, petitioners ask this Court to order that the mercury rule be delayed further, perhaps indefinitely, so that EPA can attempt to put a price on the all the other benefits of

the rule and compare the costs and benefits. As detailed below, these benefits include crucial protections for Indian health, fishing rights, and traditional cultures, protections that are not pecuniary in nature but help the United States fulfill its legal duties to American Indians and tribes. These benefits cannot readily be reduced to dollar figures. Congress instructed EPA to consider "hazards to public health," not costs, in making the threshold decision whether regulation is "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). Given the voluminous evidence that mercury emissions pose severe hazards to public health, including grave hazards to American Indian communities, regulation of those emissions undoubtedly is appropriate and necessary.

ARGUMENT

I. Mercury Emissions from Domestic EGUs Cause Major Health, Cultural, and Other Harms to American Indians

Petitioners and their amici contend that, because mercury emissions circulate in the atmosphere globally, they have "little localized impact." Cato Inst. Br. at 5; *see also* Util. Air Regulatory Group Br. at 12-13 ("Only a small fraction of the mercury emitted by EGUs deposits in the United States . . ."). These statements unduly minimize the harms caused by EGUs' mercury emissions. The record shows not only that mercury emissions from domestic EGUs have a diffuse, global effect, but also that they cause concentrated, severe harms to at-risk populations in the United States, including American Indians.

The basic pathway for human exposure to mercury from EGUs is well understood: Mercury is a

naturally occurring element (for example, in coal) and is released into the environment when fossil fuels are burned to fire EGUs. After circulating in the atmosphere, mercury eventually precipitates and is deposited back onto the Earth's land and water. Microbial action then converts mercury into methylmercury, which can be ingested by aquatic organisms and can "bioaccumulate" in greater concentrations as organisms higher up the food chain consume those lower down. *See generally* Mercury Study Report (MSR) vol. III, at 2-6 to 2-18; *see also* Regulatory Impact Analysis (RIA) at 4-3 to 4-4; Emissions Overview Memorandum at 1. "[T]he predominant exposure pathway by which humans are affected by [methylmercury] is by ingestion of fish containing it." 76 Fed. Reg. 24976, 24999 (May 3, 2011).

EGUs are by far the largest U.S. anthropogenic sources of mercury emissions. 76 Fed. Reg. at 24977; *see also* RIA at 2-7, Table 2-5. EPA estimates that up to 29% of U.S. watersheds have domestic-EGU-attributable mercury deposition that contributes to potential exposures above the maximum acceptable oral dose for methylmercury. 77 Fed. Reg. at 9311; Revised Mercury Risk Technical Support Document at 86.

EPA has also determined that, for many American Indians, "average exposures to methylmercury may be more than two-times greater than those experienced by the average population." MSR vol. IV at 7-2. The greater methylmercury exposure derives from greater fish consumption. "[S]ome Native American populations report fish consumption rates far in excess of the general population." MSR vol. VII at 2-2. Indeed, for many tribes, fish consumption

rates are so high that EPA's estimate of two-times greater exposure may be a gross underestimate: studies have shown that "[s]ome indigenous subpopulations eat 4 to 5 times the amount of fish assumed in EPA models that determine fish consumption advisories." Amy Roe, *Fishing for Identity: Mercury Contamination and Fish Consumption Among Indigenous Groups in the United States*, 23 Bull. of Sci., Tech. & Soc'y 368, 370 (2003) (quoted in MATS Rule cmt. of Little River Band of Ottawa Indians at 49) (citing C.M. Neumann et al., *Methylmercury in Fish From Owyhee Reservoir in Southeast Oregon: Scientific Uncertainty and Fish Advisories*, 201 Sci. of the Total Env't 205, 212 (1997), and E.J. Ringquist, *Environmental Justice: Normative Concerns and Empirical Evidence*, *in* Environmental Policy 241 (N.J. Vig et al. eds., 2000)).

Greater methylmercury exposure injures American Indians in a variety of ways, causing harms to their health, culture, and subsistence. Petitioners and their amici address health harms for at-risk populations generally. *See, e.g.*, Cato Inst. Br. at 9-17. However, they do not discuss American Indians specifically or mention cultural or subsistence-related harms at all, thereby evincing a significant under-appreciation of the many adverse impacts caused by EGU mercury emissions.

A. Mercury Emissions Harm Indian Health

Methylmercury is a serious public health threat, and indeed is even more so for American Indians than almost any other segment of the population. Methylmercury exposure has been linked to disorders including cardiovascular disease, autoimmune deficiencies, and infertility, *see, e.g.*, 76 Fed. Reg. at 25080-25081 (discussing scientific research), and

blood mercury levels of American Indians are among the highest of any racial or ethnic group in the United States. *See* Jane M. Hightower et al., *Blood Mercury Reporting in NHANES: Identifying Asian, Pacific Islander, Native American, and Multiracial Groups*, 114 Envtl. Health Persp. 173, 174 (2006).

In comments to EPA on the proposed MATS Rule, tribes and inter-tribal organizations repeatedly expressed great concern about disproportionate adverse health effects of methylmercury on American Indians. For example, the Forest County Potawatomi Community (FCPC) noted:

> While mercury detrimentally affects the health of the entire U.S. population, because of the Tribe's traditional sustenance way of life, which includes a heavy reliance on fish and other natural resources, we are disproportionately impacted by the effects of mercury emissions from EGUs.

MATS Rule cmt. of FCPC at 3. Similarly, the National Tribal Air Association (NTAA), an air quality management organization with more than 50 member tribes, stated: "Tribes face disproportionate health and environmental impacts from EGU mercury emissions " MATS Rule cmt. of NTAA at 2.

Women of child-bearing age are a subpopulation of great concern, due to the potential for adverse effects on children exposed to methylmercury *in utero* through maternal fish consumption. 76 Fed. Reg. at 24978, 24983. A highly potent neurotoxin, methylmercury "targets the brain of developing organisms, [and] is linked to neurobehavioral testing disorders including deficits in attention span, fine motor function, language, visual-spatial ability and

memory even at low exposure levels." Sandra W. Kuntz et al., *Methylmercury Risk and Awareness Among American Indian Women of Childbearing Age Living on an Inland Northwest Reservation*, 109 Envtl. Res. 753, 753 (2009).

In comments to EPA on the proposed MATS Rule, tribes and inter-tribal organizations expressed strong concerns about the impact of methylmercury exposure on children and women of child-bearing age. *See, e.g.*, MATS Rule cmt. of GLIFWC at 2; MATS Rule cmt. of Little River Band of Ottawa Indians at 1. Those concerns were well-justified. For example, research has indicated that children in Great Lakes tribal populations suffer IQ losses ranging from 6.2 to 7.1 points due to methylmercury exposure. Catherine A. O'Neill, *Environmental Justice in the Tribal Context: A Madness to EPA's Method*, 38 Envtl. L. 495, 531 (2008) (citing research reported by the Chairman of the Leech Lake Tribal Council and the Leech Lake Band Department of Natural Resources).

Fish consumption advisories warning of mercury contamination in fish are widespread and show how the nation has been forced to adapt to the reality of pervasive methylmercury contamination. All 50 states have fish consumption advisories for mercury. *See* EPA Nat'l Listing of Fish Advisories Technical Search, *available at* http://fishadvisory online.epa.gov/Advisories.aspx. Moreover, in some states, all (or nearly all) of the waters are contaminated with mercury and accordingly are subject to mercury-related fish consumption advisories. *See, e.g.*, Statewide Mich. Mercury Total Maximum Daily Load: Public Review Draft (2013) at 9, *available at* http://www.michigan.gov/documents/ deq/wrd-swas-hgtmdl-draft_415360_ 7.pdf (all inland

lakes and several hundred river miles subject to mercury fish advisories).

Tribes and inter-tribal organizations have been active in taking steps to protect individuals against methylmercury exposure. Tribes often partner with states in developing fish consumption advisories and other measures to protect the public, sharing and interpreting data on fish, administering surveys on fishing and fish consumption, and developing educational materials for tribal members. *See, e.g.*, State-Tribal P'Ship for Developing Advisories for the St. Lawrence R. Watershed at 8, *available at* http://water.epa.gov/scitech/swguidance/fishshellfish/fishadvisories/upload/forum2014-schottenfeld.pdf. In addition, tribes and inter-tribal organizations issue mercury fish advisories of their own. The Appendix to this brief includes an example of such an advisory – one prepared by GLIFWC for use by members of the Bad River Band of Lake Superior Chippewa (the "Bad River Advisory" or "Advisory").

Despite the diligent efforts of tribes, inter-tribal organizations, and many states to protect tribal members from overexposure, mercury fish advisories are not an adequate or appropriate substitute for eliminating mercury contamination in the first place. For example, as a researcher explained in a comment to EPA on the proposed MATS Rule, awareness of fish advisories among some American Indian subpopulations is low: a survey of American Indian women of child-bearing age in the Northwest showed that 80% were unaware of state or tribal fish advisories. *See* Kuntz et al., *supra*, at 755 (cited in MATS Rule cmt. of Sandra Kuntz at 1).

Further, even for American Indians who know of and rely on fish consumption advisories, the task of

avoiding overexposure to methylmercury can be dizzyingly complex. Tribes and inter-tribal organizations try to present advisory information as simply and clearly as possible, but there is only so much they can do to ease the complicated task of avoiding overexposure. The Bad River Advisory illustrates the challenge of creating a simple, easy-to-follow guide for fish consumption. The Advisory contains:

1. two different maps and two different sets of instructions (one for higher-risk and the other for lower-risk subpopulations);
2. different advisories for different lakes (dozens in total);
3. lake-by-lake recommendations on the maximum number of *ogaa* (walleye) meals to consume per month;
4. a warning to adjust the number of *ogaa* meals per month depending on the size of the portions consumed;
5. a suggestion to bag and label *ogaa*, before freezing, according to size and lake of origin; and
6. a recommendation to avoid certain other fish species altogether.

The Advisory shows how, for American Indians who consume large quantities of self-caught fish, avoiding methylmercury overexposure requires navigating complexities that most Americans cannot even imagine contending with in their daily lives.

Finally, and most fundamentally, for many tribes, adhering to fish advisories necessarily entails a drastic and unacceptable curtailment of their traditional reliance on fisheries. As explained more fully below, many American Indians catch and

consume fish because it is central to their tribal identity and often is essential for their survival. Indians who rely on fish as a mainstay of their culture and diet do not have an easy option of eating less fish and switching to other food sources. In comments to EPA on the proposed MATS Rule, tribes warned of the profound cultural loss and dietary impact that would result from tribal members' compliance with fish advisories. *See, e.g.*, MATS Rule cmt. of Little River Band of Ottawa Indians at 106, 158. Accordingly, these and the other aforementioned comments underscored for EPA the deep, inter-related impacts on American Indians' health, culture, and subsistence from EGU mercury emissions.

B. Mercury Emissions Harm Indian Culture

Methylmercury contamination threatens traditional Indian lifeways – lifeways that make individual tribes distinct as a people. For many tribes, fishing and fish consumption are important social practices, handed down from generation to generation. Various tribes have described fishing and fish consumption as "central" and "essential" to their cultural identity. *See, e.g.*, MATS Rule cmt. of FCPC at 5 (fishing is "essential to our individual and Tribal way of life"). *See also* MATS Rule cmt. of GLIFWC at 1 ("Fishing and fish consumption are central to Chippewa culture."); Tribal Air Resources J. vol. VI (2014) at 17 (fishing is "deeply rooted in [Lac Courte Oreilles] culture"), *available at* http://www4.nau.edu/itep/ntaa/tribal-air-programs/docs/2014_TribalAirResourcesJournal.pdf.

The following passage shows how important fishing and fish consumption can be for tribal culture:

> [T]he Ojibwe peoples understand themselves to have a *responsibility* to continue to fish and to consume fish Fishing and fish consumption are integral components of the traditional and ceremonial activities at the heart of Ojibwe culture Fishing and eating fish provide important occasions for the intergenerational transfer of knowledge (including ecological, historical, and social knowledge) that forms a central part of the inheritance of each succeeding generation.

O'Neill, *supra*, at 510 (citing Letter from James H. Schlender, Exec. Adm'r, GLIFWC, to EPA (June 29, 2004) at 2, and Sue Erickson, *Doing It Right: A Boy, His Teachings and His Net*, Mazina'igan 12-13 (2004)). *See also* Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights*, 58 Cleveland St. L. Rev. 273, 333-41 (2010) (discussing fishing and other subsistence activities as "bridges" between tribal members and across generations and time).

Methylmercury contamination of fish threatens to disrupt time-honored practices that define many tribes' cultures. One tribe has poignantly described the dilemma facing it and its members as follows:

> [T]he Tribe and its members are left with a Hobson's choice of ingesting materials that may ultimately injure Tribal members' health, or [forgoing] cultural practices that are essential to our individual and Tribal spiritual well-being and way of life.

MATS Rule cmt. of FCPC at 5. Another tribe has explained the impact of methylmercury contamination as follows:

> [T]here are many Tribal families that no longer engage in cultural practices associated with fishing, and are thus not passing these traditions to new generations of Tribal members. The loss of our cultural ceremonies, language, and songs associated with fishing represents a significant impact on our Tribe, and results in permanent loss of the culture which defines our Tribe.

O'Neill, *supra*, at 497 (quoting Letter from William W. Phillips, Tribal Chief, Aroostook Band of Micmacs, to EPA (Apr. 20, 2004)).

In comments to EPA both before and after the MATS Rule's proposal, tribes repeatedly stressed concerns about methylmercury's impact on American Indian culture and traditions. In 2010 and 2011, EPA met with tribes pursuant to Executive Order 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000), which provides for agency consultation with tribes early in the process of developing a regulation that has tribal implications. *Id.* at 67251. The tribes that EPA met with included the Upper Sioux Community of Minnesota, the Moapa Band of Paiutes, the FCPC, the Standing Rock Sioux Tribal Council, and the Fond du Lac Band. 76 Fed. Reg. at 25087. During those meetings, tribes expressed "particular concern" to EPA about several matters, one of which was "the cultural impact of impaired water quality." *Id.* As the NTAA later elaborated in written comments to EPA, Indian cultural activities "are often dependent on the purity of waters , many of which have become tainted by mercury exposure." MATS Rule cmt. of NTAA at 2.

In other written comments to EPA, tribes and inter-tribal organizations likewise emphasized cultural concerns. GLIFWC described

methylmercury contamination as a "serious threat" to "traditional lifeways." MATS Rule cmt. of GLIFWC at 2. The FCPC lamented the impact of methylmercury on fishing in one of the Tribe's most spiritually significant waters, Devil's Lake.[1] MATS Rule cmt. of FCPC at 5. The Fond du Lac Band cited the deleterious effect of mercury deposition on the Tribe's "water based culture." MATS Rule cmt. of Fond du Lac Band at 2. And the Little River Band of Ottawa Indians indicated that American Indians' cultural concerns extend not only to fish, but also to fish-eating birds and mammals, whose health is also adversely impacted by methylmercury, and whose well-being is a matter of cultural significance for many Indians. *See* MATS Rule cmt. of Little River Band of Ottawa Indians at 157. Collectively, these comments emphasized for EPA that American Indians face serious and, perhaps, unique cultural threats as a result of EGU mercury emissions.

C. Mercury Emissions Harm Indian Subsistence

Since time immemorial, Indians in many parts of the country have been a fishing people: fish has been

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[1] The example of Devil's Lake illustrates how tribes are often connected to particular waters for cultural, spiritual, or other reasons and cannot simply move their fishing to another location. As the FCPC explained in its comment:

> Devil's Lake has special significance both culturally and spiritually to FCPC and its membership [The] significance stems from the Tribe's belief that Devil's Lake is bottomless and is connected by underwater tunnels to other water bodies For centuries, the Tribe has used Devil's Lake for fishing to fulfill our responsibilities in the natural world.

MATS Rule cmt. of FCPC at 5.

a "great staple of their diet and livelihood." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 665 n.6 (1979). Treaties with the United States reserved tribes' aboriginal rights to take fish throughout their fishing areas. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999). The exercise of those age-old fishing rights was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Courts have continued to uphold the vitality of Indian fishing rights to this day. *See, e.g., Mille Lacs Band*, 526 U.S. at 200; *Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Res.*, 141 F.3d 635, 639 (6th Cir. 1998); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 365 (7th Cir. 1983); *United States v. Adair*, 723 F.2d 1394, 1409-10, 1414 (9th Cir. 1983) (treaty-reserved right to take fish impliedly reserves water necessary to fulfill that purpose).

Moreover, today, as in the past, fishing is often "critical" for tribe members' survival. MATS Rule cmt. of Little River Band of Ottawa Indians at 2. As GLIFWC observed in its comment on the proposed MATS Rule:

> *Ogaa* [walleye] and other fish represent a significant subsistence food for tribal communities. During the 2011 spring spearing and netting season alone, GLIFWC member tribes harvested nearly 70,000 *ogaa* (approximately 135,000 pounds) from inland lakes

MATS Rule cmt. of GLIFWC at 2. Subsistence fishing endures for important cultural reasons, as described above, and also because it frequently is a

matter of basic survival, such as when tribe members "are remotely located and fish is the major food source available to them." O'Neill, *supra*, at 510 n.71 (quoting Letter from Norm W. Deschampe, President, The Minnesota Chippewa Tribe, to Michael Leavitt, Adm'r, EPA (Apr. 28, 2004)).

In view of the critical importance of fish as a food source for many American Indians, it is hardly surprising that tribes emphasized subsistence concerns to EPA during the development of the MATS Rule. At the aforementioned meetings pursuant to Executive Order 13175, tribes expressed "particular concern" to EPA about "the impact [of mercury deposition] on subsistence lifestyles for fishing communities." 76 Fed. Reg. at 25087. That very concern was echoed later, in the written comments submitted to EPA by tribes and inter-tribal organizations on the proposed MATS Rule. *See, e.g.*, MATS Rule cmt. of FCPC at 3 (citing the Tribe's "sustenance way of life, which includes a heavy reliance on fish"). As the NTAA stated in its written comment, "[s]ubsistence activities on which Tribes depend for their food, such as . fishing, have been adversely affected by the deposition of mercury onto Tribal lands and into their water bodies."[2] MATS Rule cmt. of NTAA at 2. Those

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[2] In addition to harming Indian health, culture, and subsistence, mercury emissions harm Indian economies. During the aforementioned meetings between EPA and tribes, one of the matters about which tribes expressed "particular concern" was "the economic impact [of mercury deposition] on tourism." 76 Fed. Reg. at 25087. The concern was that mercury contamination in tribal lakes, rivers, and streams would deter recreational fishing and tourism – a major source of revenue for many tribes. *See, e.g.*, MATS Rule cmt. of FCPC at 6. Tribes also emphasized their economic concern in written comments to

communications emphasized to EPA the significant negative impact on many American Indians' food sources from EGU mercury emissions.

II. The MATS Rule Will Benefit American Indians Significantly

In developing the MATS Rule, EPA considered and addressed the substantial impact of EGU mercury emissions on American Indians. Consistent with Congress's expressed intent in Section 112 to protect "sensitive populations" from mercury exposure,[3] EPA examined each of the categories of harm to American Indians discussed above, and developed a rule that will abate them significantly. Due to data limitations, EPA did not calculate a dollar value for many of the benefits of the MATS Rule. However, that does not mean that the mercury-related benefits of the rule are, as petitioners and their amici contend, "minimal," "negligible," and "*de minimis*." Mich. Br. at 46; U.S. Chamber of Commerce Br. at 13; Cato Inst. Br. at 5. Rather, for American Indians and others, the

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EPA. *See id.*; *see also* MATS Rule cmt. of Fond du Lac Band at 1. Through these communications, the tribes stressed to EPA that, for tribes dependent on recreational fishing and tourism, the economic cost of not regulating mercury emissions can be significant.

[3] 42 U.S.C. § 7412(n)(1)(C) (requiring a study of the health effects of mercury, with consideration of fish consumption by "sensitive populations"). EPA's consideration of the impact of continued, unregulated mercury emissions on American Indians was consistent not only with Section 112, but also Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994), which, for more than 20 years, has required the Agency to address any disproportionately high and adverse environmental effects of its policies on minority populations, with the goal of achieving environmental protection for all communities. *See id.* at 7629.

mercury-related benefits of the rule are substantial and critically important.

EPA's reliance on the disproportionate mercury-emissions-impact on American Indians can be seen from the Agency's Revised Mercury Risk Technical Support Document (TSD). EPA's decision that it is "appropriate and necessary" to regulate EGUs – and hence to issue the final MATS Rule – was based in part on the Revised Mercury Risk TSD. 77 Fed. Reg. at 9362. EPA's goal with the TSD was "to determine whether mercury emitted from U.S. EGUs poses a potential public health hazard." Revised Mercury Risk TSD at viii. To make that determination, EPA modeled mercury exposure based on a "hypothetical female subsistence consumer" scenario. *Id.*

In developing the "hypothetical female subsistence consumer" scenario, EPA relied on data regarding "those self-caught fish consumers with the highest intake rates and therefore, those who will experience the greatest [mercury] exposures at a given watershed." Revised Mercury Risk TSD at 8. EPA "used peer-reviewed study data to characterize consumption rates for a variety of high-consuming fisher populations," including "Great Lakes Tribal populations." *Id.*; *see also id.* at 32, 40. Based on that data, EPA developed a "Tribal scenario" of risks, in addition to the national-level "hypothetical female subsistence consumer" scenario. *See id.* at 32, 80. EPA concluded that "U.S. EGU-attributable risks for the Tribal scenario are similar to those for the *typical female subsistence fish consumer* scenario." *Id.* at 111. In other words, the risk estimates underlying the final MATS Rule provide, in EPA's words, "coverage," *id.* at 83, for the methylmercury risks faced by high-fish-consuming tribal populations for

which peer-reviewed data is available.

The foregoing by itself indicates that the MATS Rule will lead to major benefits for American Indians, since the rule accounts for many tribes' high levels of fish consumption. However, there is still other evidence in the record that demonstrates that the rule will address the health, cultural, and other impacts on tribes as a result of EGU mercury emissions. In documents in the record, EPA:

- explained that the Revised Mercury Risk TSD is based on a high-fish-consuming scenario that does not assume compliance with fish consumption advisories, which, as noted above, are sometimes ineffective, Resps. to Cmts. vol. 1 at 167;
- rejected several commenters' suggestion that there has been a downward trend in blood mercury levels, relying, in part, on a 2006 study showing high blood mercury levels among American Indians, *id.* at 149 (citing Hightower, *supra*);
- indicated that the MATS Rule is likely to have a beneficial economic impact related to recreational fishing and tourism, including in Indian country, Resps. to Cmts. vol. 2 at 652; and
- explained that the rule will benefit American Indian communities with "subsistence lifeways," *id.* at 681, as well as fish-eating birds and mammals, 77 Fed. Reg. at 9424.

Overall EPA concluded that the MATS Rule will reduce EGU emissions of mercury, and that reducing those emissions will result in reduced mercury deposition in many highly impacted watersheds. *See* RIA at ES-1; 77 Fed Reg. at 9305, 9356. Further,

EPA concluded that some American Indian subpopulations could receive an especially great benefit from the MATS Rule due to their fish consumption patterns. Resps. to Cmts. vol. 2 at 623, 652 (citing sensitivity analysis); *see also* Revised Mercury Risk TSD at 87-91 (sensitivity analysis).

EPA decided that it could not calculate a dollar value for certain "important" mercury reduction benefits of the MATS Rule. RIA at ES-1. The Agency's estimate of the rule's mercury reduction benefits – $4 to $6 million using a 3% discount rate – reflects only the benefit for expected lifetime earnings of avoiding lost IQ points. *Id.*; *see also id.* at 4-45 to 4-57; 77 Fed. Reg. at 9428. EPA concluded that the data available on IQ loss could be "readily monetized for use in cost-benefit analysis." RIA at 4-34. For other mercury reduction benefits, however, EPA concluded that data limitations prevented monetization. *See id.* at ES-1 to ES-2; ES-9. The benefits which EPA could not monetize due to data limitations included, among others, the aforementioned benefits of mercury reduction related to wildlife and recreational fishing, as well as cognitive, neurological, and other health benefits other than avoided IQ loss. *See* Resps. to Cmts. vol. 2 at 652; RIA at 4-35, 4-64 to 4-65.

In addition to the benefits related to health, wildlife, and recreational fishing, EPA did not monetize numerous other mercury reduction benefits of the MATS Rule for American Indians, including the cultural benefits of preserving traditional subsistence lifeways. EPA cautioned that such un-monetized benefits should not be deemed small or unimportant simply because they could not be monetized, explaining that the value of the

unquantified health and environmental benefits alone could be "substantial." RIA at ES-9.

Accordingly, petitioners and their amici are wrong in asserting that the mercury reduction benefits of the MATS Rule are "minimal," "negligible," and "*de minimis*." Mich. Br. at 46; U.S. Chamber of Commerce Br. at 13; Cato Inst. Br. at 5. That disparaging assessment fails to appreciate the serious and disproportionate impact of EGU mercury emissions on American Indians, and the critical health, cultural, and other benefits that tribes and their members stand to gain as a result of mercury reduction under the MATS Rule.

III. Congress Did Not Require EPA to Assess the Monetary Value of Indian Health, Fishing Rights, and Traditional Ways of Life

The crux of petitioners' argument is that the fifteen-year process by which EPA made the threshold decision to regulate mercury emissions was too hasty because EPA should have undertaken a lengthy process of assessing and weighing the costs and benefits of regulating. As shown above, EPA did consider the benefits of regulating, including the need to protect American Indian health, fishing rights, and traditional ways of life. Petitioners do not acknowledge these benefits, however, for the sole reason that EPA did not put a price on them. *See* Mich. Br. at 4 (identifying only monetized health benefits from the MATS Rule); Nat'l Mining Ass'n Br. at 1 (same); Utility Air Regulatory Group Br. at 1 (same). As EPA explained, the "calculated benefits are a small subset of the benefits of reducing [mercury] emissions" under the MATS Rule. 77 Fed. Reg. at 9428. Ignoring EPA's consideration of the demonstrated benefits of the rule, petitioners

apparently would require that EPA monetize all costs and benefits in making the initial determination whether regulation is "necessary and appropriate." That argument is belied by the fact that another provision of the Clean Air Act, 42 U.S.C. § 7412(d)(2), explicitly requires EPA to consider "the cost of achieving emission reduction" in setting emission standards. No similar language requires EPA to consider costs or, as petitioners seem to suggest, compare costs and benefits, in making the initial decision whether to set an emissions standard.

If petitioners were right, the crucial protections provided by the MATS Rule must be delayed by an untold number of years or perhaps indefinitely. Such a delay would be necessary so that EPA can go on the fool's errand of attempting to put a dollar value on the health of American Indians so that it could be compared to the costs of regulation. EPA would also need to place a dollar value on tribal fishing rights. And EPA would need to calculate the value of American Indian traditional ways of life. Nothing in the text of the Clean Air Act remotely suggests that EPA is required to assign a dollar value to American Indian health, fishing rights, and traditional cultures in making the threshold decision whether regulation of mercury emissions is "appropriate and necessary."

The benefits of the mercury rule to American Indians are fundamentally different in kind than the economic costs the rule imposes on petitioners and cannot be compared on the same scale. Providing these benefits fulfills the government's duties to American Indians, including the obligation to protect Indian health, *see, e.g.*, 25 U.S.C. § 1602; the obligation to protect tribal fishing rights, *see* Cohen's Handbook of Federal Indian Law § 18.02 (2012 ed.)

(discussing the variety and scope of treaty-protected fishing rights); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (declaring that "[i]n carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party [I]t has charged itself with moral obligations of the highest responsibility and trust."); and the obligation to protect traditional American Indian ways of life, *see, e.g.*, *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968) (describing the "essence" of the treaty as the protection of the tribe's ability to "maintain their way of life which included hunting and fishing"). At a minimum, fulfillment of the United States' solemn and perpetual obligations to the tribes cannot be conceived as a mere pecuniary benefit that should be weighed against the economic costs that regulation imposes on petitioners.

Even if protection of American Indian health, fishing rights, and traditional cultures could be understood as a simple benefit of the mercury rule, rather than the fulfilment of the United States' obligations to Indian tribes, the value of those benefits defies easy calculation. Under what principle was EPA supposed to assess the value of the health of American Indian subsistence fishermen? How was EPA supposed to calculate the value of treaty-protected fishing rights? What principle could EPA employ to assess the value of traditional Indian cultures? If petitioners are correct that determining whether regulation is "appropriate and necessary" requires EPA to consider only monetized costs and benefits, EPA would be required not merely to put a dollar figure on tribal health, subsistence, fishing rights, and cultural rights, but would first be

required to develop an acceptable methodology for doing so. Yet even proponents of rigorous cost-benefit analysis have recognized that interests like those at issue here cannot readily be monetized. *See, e.g.*, Cass R. Sunstein, *The Limits of Quantification*, 102 Calif. L. Rev. 1369, 1380-85 (2014).

The text of the Clean Air Act makes clear that Congress did not envision that EPA do the impossible and undertake a balancing of incommensurable costs and benefits before making the initial decision to regulate hazardous air pollutants. While Congress directed EPA to consider costs in the later determination of setting emissions standards, 42 U.S.C. § 7412(d)(2), Congress instructed EPA to consider "hazards to public health," not costs, in making the threshold decision whether regulation is "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). EPA reasonably construed this provision not to require a balancing of benefits and costs. Given the voluminous evidence that mercury emissions pose severe hazards to public health, including grave hazards to American Indian communities, regulation of those emissions undoubtedly is appropriate and necessary.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JARED A. GOLDSTEIN
PROFESSOR OF LAW
ROGER WILLIAMS
UNIV. SCH. OF LAW
BRISTOL, RI 02809

KEVIN LYSKOWSKI
Counsel of Record
1300 PENN. AVE., NW, 190-321
WASHINGTON, DC 20004
Tel: (240) 506-5183
klyskowski@post.harvard.edu

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RIYAZ KANJI
KANJI & KATZEN P.L.L.C.
303 DETROIT ST., STE. 400
ANN ARBOR, MI 48104

PHIL KATZEN
JOHN SLEDD
KANJI & KATZEN P.L.L.C.
401 2ND AVE. S., STE. 700
SEATTLE, WA 98104

ELIZABETH KRONK WARNER
ASSOC. PROFESSOR OF LAW
THE UNIV. OF KANSAS SCH. OF LAW
LAWRENCE, KS 66045

JOHN DOSSETT
COLBY D. DUREN
REBECCA HOWLETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P ST., NW
WASHINGTON, DC 20005

RICHARD A. GUEST
NATIVE AMERICAN RIGHTS FUND
1514 P ST., NW, STE. D
WASHINGTON, DC 20005

ERICK ARNOLD
BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA TRIBE
72682 MAPLE ST.
ODANAH, WI 54861

SEAN COPELAND
FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA
1720 BIG LAKE RD.
CLOQUET, MN 55720

KEKEK JASON STARK
LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS
13394 W. TREPANIA RD.
HAYWARD, WI 54843

DAVID UJKE
RED CLIFF BAND of LAKE SUPERIOR CHIPPEWA
88385 PIKE RD.
BAYFIELD, WI 54814

HOWARD BICHLER
ST. CROIX CHIPPEWA INDIANS OF WISCONSIN
24663 ANGELINE AVE.
WEBSTER, WI 54893

COLETTE ROUTEL
PROFESSOR OF LAW
WILLIAM MITCHELL COLLEGE OF LAW
875 SUMMIT AVE.
ST. PAUL, MN 55105

ROBERT C. LOTHROP
COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION
700 NE MULTNOMAH ST.
STE. 1200
PORTLAND, OR 97232

Appendix

Mercury Fish Advisory for Bad River Band of Lake Superior Chippewa Tribe

This Map Is to Help You Find Safe Ogaa (Walleye) in Lakes Harvested by Bad River

MAP FOR USE BY PREGNANT WOMEN, WOMEN OF CHILDBEARING AGE, AND CHILDREN UNDER 15 YEARS OF AGE.

DO NOT EAT OGAA LARGER THAN 20 INCHES.
EAT OGAA LESS THAN 20 INCHES AND CHOOSE EVEN SMALLER OGAA TO FURTHER REDUCE MERCURY EXPOSURE.

SISKIWIT L

RIB L

L MINNESUING

BAYFIELD

TAYLOR

DOWLING L

UPPER EAU CLAIRE L

IRON

DOUGLAS

ASHLAND

FISHER L

N TURTLE L

PRESQUE ISLE L CHAIN

HARRIS L

ANNABELLE L

DIAMOND L

ENGLISH L

LONG L

OXBOW L

MIDDLE EAU CLAIRE L

LOWEN

PINE L

TENDERFOOT L

WHITEFISH L

MINERAL L

L GALILEE

SPIDER L

BOND L

NAMEKAGON L

GORDON L

ECHO L

LYNX L

MAMIE L

NELSON L

TRUDE L

BIRCH L

CRAB L

FOREST L

L OF THE FALLS

S TURTLE L

WASHBURN

TEAL L

HIGH L

TURTLE-FLAMBEAU FL

BLACK OAK L

ISLAND L

RUSK

LOST LAND L

BEAR L

LOST CANOE L

VILAS

CHAIN L

LONG L

SAWYER

BUTTERNUT L

ROUND L

HOLCOMBE FL

PIKE L

SQUAW L

DUNN

RAINBOW FL

TAINTER L

CONNORS L

SOLBERG L

TURNER L

ONEIDA

LAC SAUT DORE

DUROY L

LONG L

L WISSOTA

CHIPPEWA

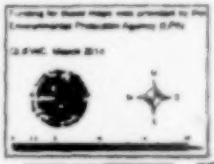
BARRON

HEMLOCK L

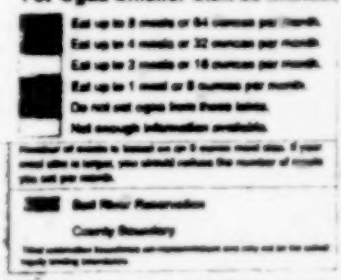
DAIRYLAND RESERVOIR

RUSK

PRICE



For Ogaa Smaller than 20 inches:


Eat up to 8 meals or 64 ounces per month.
Eat up to 4 meals or 32 ounces per month.
Eat up to 2 meals or 16 ounces per month.
Eat up to 1 meal or 8 ounces per month.
Do not eat ogaa from these lakes.
Not enough information available.
Bad River Reservation
County Boundary

MAP FOR USE BY WOMEN BEYOND CHILDBEARING AGE AND BY MEN

FOR OGAA LARGER THAN 20 INCHES, EAT FEWER MEALS.

SISKIWIT L
L MINNESUING
BAYFIELD
DOWLING L
UPPER EAU CLAIRE L
IRON
DOUGLAS
ASHLAND
N TURTLE L
PRESQUE ISLE L CHAIN
FISHER L
HARRIS L
ANNABELLE L
DIAMOND L
ENGLISH L
LONG L
OXBOW L
MIDDLE EAU CLAIRE L
LOWEN
PINE L
TENDERFOOT L
WHITEFISH L
MINERAL L
L GALILEE
SPIDER L
BOND L
NAMEKAGON L
GORDON L
ECHO L
LYNX L
MAMIE L
NELSON L
TRUDE L
BIRCH L
CRAB L
FOREST L
L OF THE FALLS
S TURTLE L
TEAL L
HIGH L
BEAR L
TURTLE-FLAMBEAU FL
BLACK OAK L
ISLAND L
RUSK
LOST LAND L
ROUND L
LOST CANOE L
VILAS
CHAIN L
LONG L
SAWYER
BUTTERNUT L
PIKE L
HOLCOMBE FL
SQUAW L
DUNN
RAINBOW FL
TAINTER L
CONNORS L
SOLBERG L
TURNER L
ONEIDA
LAC SAUT DORE
DUROY L
LONG L
HEMLOCK L
DAIRYLAND RESERVOIR
RIB L
BARRON
TAYLOR

Recommended Maximum Number of Ogaa Meals per Month for Lakes Harvested by Bad River

SORTING AND LABELING *OGAA* PRIOR TO FREEZING

When Cleaning *Ogaa*:

- Put *ogaa* under 20 inches in bags labeled "under 20 inches."
- Put *ogaa* over 20 inches in bags labeled "over 20 inches."
- Label bags with the lake name.
- Follow the advice below for maximum number of meals per month.

USING THIS CHART TO FIND SAFER *GIIGOONH*

MAXIMUM NUMBER OF MEALS PER MONTH

Advice is for all lakes combined. For example, if you eat four meals in a month from green lakes you should not eat any other meals of *ogaa* in that month.

MEAL SIZE

Meal size is based on 8 ounces. An average 19 inch *ogaa* will have 8 ounces of meat. If your meal size is larger you should eat fewer meals of *ogaa*. If it is smaller you can eat more meals of *ogaa*.

OTHER *GIIGOONH*

Giigoonh such as muskellunge, largemouth bass, smallmouth bass, and northern pike will have more mercury than *giigoonh* such as lake whitefish, herring, bluegill, sunfish, crappie or perch. Try to choose safer *giigoonh*.

LAKE	COUNTY	Women of childbearing age and children less than 15 Maximum number of meals per month	Women beyond childbearing years and men 15 and older Maximum number of meals per month
ANNABELLE L	VILAS		2
BEAR L	ASHLAND		2
BIRCH L	VILAS		2
BLACK OAK L	VILAS		
BOND L	DOUGLAS		
BUTTERNUT L	PRICE		2
CHAIN L	RUSK		
CLAM R FL	BURNETT	Not Enough Information	
CONNORS L	SAWYER	2	
CRAB L	VILAS		2
DAIRYLAND RESERVOIR	RUSK		2
DIAMOND L	BAYFIELD		2
DOWLING L	DOUGLAS		2
DUROY L	PRICE		
ECHO L	IRON		
ENGLISH L	ASHLAND		2
FISHER L	IRON	Not Enough Information	
FOREST L	VILAS		
GORDON L	ASHLAND	Not Enough Information	
HARRIS L	VILAS		
HEMLOCK L	BARRON	Not Enough Information	
HIGH L	VILAS		
HOLCOMBE FL	CHIPPEWA		
ISLAND L	RUSK	2	
L GALILEE	ASHLAND		
L MINNESUING	DOUGLAS		2
L OF THE FALLS	IRON	Not Enough Information	
L OWEN	BAYFIELD		
L WISSOTA	CHIPPEWA		
LAC SAULT DORE	PRICE	2	
LONG L	CHIPPEWA	2	
LONG L	IRON		2

LAKE	COUNTY	Women of childbearing age and children less than 15 Maximum number of meals per month	Women beyond childbearing years and men 15 and older Maximum number of meals per month
LONG L	PRICE		
LOST CANOE L	VILAS	Not Enough Information	
LOST LAND L	SAWYER		
LYNX L	VILAS		2
MAMIE L	VILAS		
MIDDLE EAU CLAIRE L	BAYFIELD		
MILLE LACS	MILLE LACS	2	
MINERAL L	ASHLAND		2
N TURTLE L	VILAS		2
NAMEKAGON L	BAYFIELD		
NELSON L	SAWYER		
OXBOW L	VILAS		2
PIKE L	PRICE		
PINE L	IRON		2
PRESQUE ISLE L CHAIN	VILAS	2	
RAINBOW FL	ONEIDA		2
RIB L	TAYLOR		
ROUND L	PRICE		2
S TURTLE L	VILAS		2
SISKIWIT L	BAYFIELD		2
SOLBERG L	PRICE		2
SPIDER L	IRON		2
SQUAW L	VILAS		2
TAINTER L	DUNN		
TEAL L	SAWYER	2	
TENDERFOOT L	VILAS		
TRUDE L	IRON		2
TURNER L	PRICE		
TURTLE-FLAMBEAU FL	IRON		2
UPPER EAU CLAIRE L	BAYFIELD		
WHITEFISH L	DOUGLAS		

For many native people, *giigoonh* are part of a traditional and healthy diet. If you rely on *giigoonh*, choose safer *giigoonh* with lower levels of mercury by following the advice on this map.

RISKS AND BENEFITS

Risk: Mercury can damage the nervous system, especially the brain. Fetuses and babies are the most at risk because their nervous systems are rapidly developing. Children exposed to unsafe levels while in the womb have been found to experience delayed development in walking and talking, even though the mother was not affected. Mercury cannot be removed by trimming or cooking.

Benefit: Eating even as few as two to three meals of *giigoonh* a month may reduce your risk of death due to heart disease.

If you have questions about finding safer ogaa, call GLIFWC at 1-715-682-6619.
To learn more about mercury in ogaa, visit GLIFWC's website at www.glifwc.org/Mercury/mercury.html